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IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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MOTION OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to this Court's Rule 37.3(b), the National Association of Securities Dealers, Inc., respectfully moves for leave to file the attached *amicus curiae* brief supporting petitioners. Letters signed by counsel for petitioners and counsel for respondent Glen Billing consenting to the filing of this brief have been lodged with the Court. Counsel for respondent Milton Pfeiffer has withheld consent to the filing of this brief.

The question presented in this case is whether a cause of action is available under the federal antitrust laws to challenge alleged collusive conduct and market manipulation in initial public offerings by underwriters and institutional investors. The National Association of Securities Dealers, Inc. ("NASD"), has a substantial interest in the resolution of this

question because the NASD has regulatory responsibilities that fall within, and extend beyond, the subject matter of this suit. The availability of an antitrust cause of action based on alleged collusion and market manipulation by broker-dealers would disrupt the NASD's carefully calibrated regulatory regime.

The NASD is a private Delaware corporation, functioning as a self-regulatory organization ("SRO") for its broker-dealer members, and is registered with the Securities and Exchange Commission ("SEC") as a national securities association pursuant to the 1938 Maloney Act Amendments to the Securities Exchange Act of 1934. 15 U.S.C. § 78o-3 *et seq.* The NASD and other SROs exercise front-line regulatory authority over the securities industry, subject to the stringent oversight of the SEC, which must approve nearly all SRO rules. For more than half a century, the NASD has been the primary regulatory body for the broker-dealer industry, and it closely regulates the market activities of the underwriters named as defendants in this antitrust suit. SEC Release No. 34-2211, 5 S.E.C. 627 (Aug. 7, 1939). The SEC has filed civil actions and the NASD has initiated disciplinary proceedings in response to the incidents of alleged price manipulation challenged in this case, including against several of the petitioners.

The NASD's regulatory responsibilities provide it with a unique perspective into the issues raised by this case and a profound awareness of the far-reaching consequences that would result from superimposing the antitrust laws on the securities regulatory framework. The Second Circuit's holding that investors may bring antitrust suits challenging alleged collusion and market manipulation by broker-dealers will create two conflicting systems of securities regulation: one overseen by the SEC and subject to the SEC's and NASD's expert decisions balancing competition and other goals; the other overseen by juries focusing solely on competition. The availability of an alternative securities regulatory

system under the antitrust laws will significantly disrupt the uniform national securities market that Congress intended to establish. The extensive litigation and crippling regulatory confusion that will inevitably result from the Second Circuit's decision will impede the SEC's and NASD's efforts to regulate the broker-dealer industry in a manner that promotes market stability and capital formation, and will harm the interests of millions of American investors.

For the foregoing reasons, the NASD respectfully requests that this Court grant its motion for leave to file the attached *amicus curiae* brief.

Respectfully submitted.

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QUESTION PRESENTED

Whether a cause of action is available under the federal antitrust laws, based upon alleged collusive conduct and price manipulation by underwriters and institutional investors in the national securities markets, where Congress has directed that the challenged conduct be subject to comprehensive regulation by the Securities and Exchange Commission and the National Association of Securities Dealers.

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BRIEF OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether a cause of action is available under the federal antitrust laws to challenge alleged collusive conduct and market manipulation in initial public offerings by underwriters and institutional investors. The National Association of Securities Dealers, Inc. ("NASD"), has a substantial interest in the resolution of this question because the NASD has regulatory responsibilities that fall within, and extend beyond, the subject matter of this suit. The availability of an antitrust cause of action based on alleged collusion and market manipulation by broker-dealers would disrupt the NASD's carefully calibrated regulatory regime—a regime that, pursuant to a longstanding congressional plan, balances competition with other important market-related objectives; that provides ample guidance for participants in the initial public offering ("IPO") marketplace; and that includes broad authority to punish the misconduct of market participants.

The NASD is a private Delaware corporation, functioning as a self-regulatory organization ("SRO") for its broker-dealer members, and is registered with the Securities and Exchange Commission ("SEC") as a national securities association pursuant to the 1938 Maloney Act Amendments to the Securities Exchange Act of 1934. 15 U.S.C. § 78o-3 *et seq.*

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that counsel for co-petitioner Bear, Stearns & Co., Inc., is also counsel for *amicus* in this matter, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The NASD and other SROs exercise front-line regulatory authority over the securities industry, subject to the stringent oversight of the SEC, which must approve nearly all SRO rules. For more than half a century, the NASD has been the primary regulatory body for the broker-dealer industry, and it closely regulates the market activities of the underwriters named as defendants in this antitrust suit. SEC Release No. 34-2211, 5 S.E.C. 627 (Aug. 7, 1939). Significantly, the SEC and NASD are statutorily required to consider competition—the goal of the antitrust laws—as one of several goals to be balanced when discharging their regulatory responsibilities. 15 U.S.C. § 77b(b); *id.* § 78o-3(b)(9). The SEC has filed civil actions and the NASD has initiated disciplinary proceedings in response to the incidents of alleged price manipulation challenged in this case, including against several of the petitioners.

The NASD's regulatory responsibilities provide it with a unique perspective into the issues raised by this case and a profound awareness of the far-reaching consequences that would result from superimposing the antitrust laws on the securities regulatory framework. The Second Circuit's holding that investors may bring antitrust suits challenging alleged collusion and market manipulation by broker-dealers will create two conflicting systems of securities regulation: one overseen by the SEC and subject to the SEC's and NASD's expert decisions balancing competition and other goals; the other overseen by juries focusing solely on competition. The availability of an alternative securities regulatory system under the antitrust laws will significantly disrupt the uniform national securities market that Congress intended to establish. The extensive litigation and crippling regulatory confusion that will inevitably result from the Second Circuit's decision will impede the SEC's and NASD's efforts to regulate the broker-dealer industry in a manner that promotes market stability and capital formation, and will harm the interests of millions of American investors.

STATEMENT

Investors who have suffered losses due to improper collusion and market manipulation by broker-dealers have several remedies at their disposal, including filing a securities fraud claim against the broker-dealers or initiating a complaint against them with the NASD or the SEC. An antitrust claim, however, is not among the available remedies.

When Congress enacted the securities laws, it impliedly repealed the antitrust laws as to market activities subject to pervasive SEC and SRO regulation and thereby immunized these activities from antitrust liability. Indeed, as this Court has recognized on at least two occasions, repeal of the antitrust laws "*must* be implied in order to permit the Exchange Act to function as envisioned by the Congress." *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 688 (1975) (emphasis added); *see also United States v. NASD, Inc.*, 422 U.S. 694, 734 (1975).

The Second Circuit's contrary conclusion undermines the securities regulatory system and "poses a substantial danger that" market participants will "be subjected to duplicative and inconsistent standards" (*NASD*, 422 U.S. at 735) under the overlapping and often conflicting mandates of the securities and antitrust laws. This Court should reverse the Second Circuit's decision to ensure that the reticulated securities regulatory regime established by Congress, and the rules issued by the NASD and approved by the SEC, are not undermined by antitrust claims that impose inconsistent obligations on market participants and that are decided by juries lacking the SEC's and NASD's specialized knowledge of the securities markets.

1. The allegations in this case concern IPO activities of underwriting firms and institutional investors that are subject to extensive regulation by the SEC and NASD. Underwriters play an integral role in the IPO process, and thus in the capital formation process. In a "firm commitment" underwriting,

they purchase securities from an issuing corporation at a predetermined price and then resell the securities to institutional investors and members of the public at a higher price. Pet. App. 4a. To mitigate the risk inherent in the IPO process, underwriters form "syndicates" with other firms, which jointly underwrite a security. Pet. App. 5a. The NASD regulates syndicate operations. *See, e.g.*, NASD Rule 2710: Corporate Financing Rule—Underwriting Terms and Arrangements.

An underwriter has a strong stake in the success of the securities that it markets because, among other things, price increases that occur in the aftermarket—the period after an IPO is first distributed—augment the benefit to its customers and the likelihood that the firm will be hired to underwrite future IPOs. Pet. App. 8a. The NASD has issued rules that establish the boundary between lawful activities designed to maintain a security's price and improper efforts to manipulate price through collusion with other broker-dealers. *See, e.g.*, NASD Manual, IM-2110-5: Anti-Intimidation/ Coordination.[2] Activities permitted under these rules are essential to the capital formation process and to the ability of broker-dealers to respond quickly and innovatively to unfavorable market conditions. Indeed, without the ability to maintain the prices of securities in the initial aftermarket, the price of many IPOs would drop swiftly and precipitously—harming investors and the national economy—because many investors who purchase IPOs attempt to make a quick profit by selling their shares immediately after a company goes public. These rules afford underwriters the flexibility to maintain

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[2] The SEC has also promulgated extensive regulations—most notably, Regulation M—that draw a precise line between permissible and impermissible efforts to maintain a security's price. *See, e.g.*, 17 C.F.R. § 242.104(b) (prohibiting activities to peg a security's price, "except for the purpose of preventing or retarding a decline in the market price of a security").

the prices of securities in the immediate aftermarket—without engaging in long-term price manipulation—and thus enable the NASD to further the statutory objective of "protect[ing] investors and the public interest." 15 U.S.C. § 78o-3(b)(6).

2. Respondents challenged the validity of activities within the syndicate regulatory framework and several incidents of alleged market manipulation by filing an antitrust suit in the United States District Court for the Southern District of New York against a number of major underwriters and institutional investors. Pet. App. 72a. One group of respondents filed suit under section 1 of the Sherman Act, 15 U.S.C. § 1, while another group initiated a class action alleging violations of section 2(c) of the Robinson-Patman Act. *Id.* § 13(c). Both sets of claims challenged the validity of syndicate arrangements used to market IPOs and alleged that underwriting firms and institutional investors had conspired to inflate the aftermarket price of a number of technology securities that went public in the late 1990s. Pet. App. 17a-20a.

The SEC submitted an *amicus* brief urging the district court to dismiss respondents' claims. Pet. App. 124a. The SEC argued that the antitrust laws had been impliedly repealed in this area because the securities transactions at issue were subject to comprehensive SEC and NASD oversight and that respondents' "attempts to remedy th[eir] claims through the antitrust laws threaten to disrupt the Commission's regulatory regime." Pet. App. 128a n.1.

The district court dismissed the case in its entirety. Pet. App. 121a. Relying upon this Court's decisions in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, and *United States v. NASD, Inc.*, 422 U.S. 694, the court concluded that respondents' allegations did not state a valid antitrust claim because—at least as to the market activities challenged in this suit—the antitrust laws have been impliedly repealed by the federal securities laws. Pet. App. 73a. The court concluded that "the SEC, both directly and through its pervasive over-

sight of the NASD and other SROs, either expressly permits the conduct alleged . . . or has the power to regulate the conduct," and accordingly that a "failure to find implied immunity would conflict with [the] overall regulatory scheme." Pet. App. 119a (internal quotation marks omitted).

3. The Second Circuit reversed. Based upon its interpretation of *Gordon* and *NASD*, the court developed a fact-intensive four-pronged test for determining whether the antitrust laws have been impliedly repealed. Pet. App. 57a. The Second Circuit's novel framework—which had not been applied by any court, including the Second Circuit, in earlier antitrust immunity cases (*see, e.g.*, *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003))—considers the securities laws' legislative history, whether the antitrust and securities laws could impose conflicting mandates on regulated persons, whether application of the antitrust laws would nullify a provision of the securities laws, and the frequency with which the SEC and NASD regulate the anticompetitive conduct. Pet. App. 57a.

The Second Circuit concluded that Congress had not intended an implied repeal of the antitrust laws in this factual setting because the securities laws' legislative history yielded no explicit evidence of Congress's intention to do so. Pet. App. 64a. The Second Circuit also emphasized that respondents had failed to identify a provision of the securities laws that would be nullified by the availability of antitrust relief and that the SEC had not explicitly authorized the anticompetitive agreements alleged by respondents. Pet. App. 65a-66a. Refusing to credit the arguments raised by the SEC as *amicus curiae*, the court dismissed as irrelevant the extensive securities regulatory regime with which underwriters and institutional investors must comply. Although the Second Circuit conceded that "their conduct may be subject to regulation and control by the SEC in great detail," it did not accord that factor any weight in its analysis because petitioners had not

received explicit authorization to engage in the market manipulation of which they stand accused. Pet. App. 69a.

After a petition for certiorari was filed, the Court called for the Solicitor General's views on the case. The United States took the position that dismissal on antitrust immunity grounds is warranted if the alleged conduct is either authorized under the securities laws or inextricably intertwined with such authorized activities. Cert.-Stage U.S. Br. at 8. The United States emphasized that the Second Circuit's failure to afford immunity to activities inextricably intertwined with permissible collaborative conduct by broker-dealers would vitiate the immunity afforded to authorized activities and generate conflict between the overlapping antitrust and securities regulatory regimes. *Id.* at 11. The United States concluded that certiorari, and reversal of the decision below, were warranted because the Second Circuit's cramped view of antitrust immunity threatened to undermine the system of securities regulation and impede the capital formation process. *Id.* at 9.

This Court granted certiorari on December 7, 2006.

SUMMARY OF ARGUMENT

The NASD possesses a unique regulatory vantage point, informed by extensive institutional knowledge about the complex workings of the securities markets. From the NASD's perspective, the Second Circuit's decision should be reversed to prevent the disruption of the comprehensive and uniform regulatory system established by the federal securities laws.

The Second Circuit's decision allowing respondents' antitrust suit to proceed is fundamentally inconsistent with the regulatory regime that Congress established when enacting the securities laws. Congress intended for the regulation of the securities markets to rest with an expert agency, the SEC, and with the expert SROs, including the NASD, that operate under the SEC's close regulatory oversight. Pursuant to this

regulatory authority, the SEC and SROs have established a carefully reticulated securities regulatory regime that—unlike the antitrust laws—promotes both competition and other, perhaps conflicting, interests, including market stability and capital formation. 15 U.S.C. § 77b(b). For example, the SEC and NASD have issued rules that authorize certain types of price stabilization and coordinated activity by underwriters, while forbidding others. *See, e.g.*, 17 C.F.R. § 242.104; NASD Manual, IM-2110-5: Anti-Intimidation/Coordination; NASD Rule 2770: Disclosure of Price in Selling Agreements. Moreover, to safeguard the capital formation process, the SEC and NASD modify their rules when needed to respond to rapidly changing market conditions. The availability of an antitrust cause of action to challenge alleged price manipulation and coordination by broker-dealers subjects the regulated community to conflicting standards of conduct and vests antitrust juries with significant authority over the operations of the securities markets. It was precisely to avoid such regulatory uncertainty and inexpert decision-making that Congress impliedly repealed the antitrust laws in this area when enacting the Exchange Act and Securities Act.

As this Court made clear in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States v. NASD, Inc.*, 422 U.S. 694 (1975), and recently reiterated in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), the antitrust laws are impliedly repealed if there is a pervasive regulatory regime in place, or if a potential conflict between the antitrust laws and securities laws exists. In this case, the market activities of all broker-dealers—including syndicate relationships between underwriters and price-maintenance activities—are comprehensively regulated by the SEC and NASD, and therefore impliedly immune from antitrust liability. The Second Circuit's analysis of implied immunity not only disregards the SEC's and NASD's extensive regulation of the securities industry, but also contradicts this Court's instruction that anti-

trust immunity should be implied whenever a *potential* conflict exists between the securities and antitrust laws. The Second Circuit's emphasis on whether a *specific* conflict exists between the securities and antitrust laws is significantly underinclusive and would allow antitrust suits to proceed regarding many activities subject to comprehensive regulation by the SEC and NASD. The proposal of the United States that antitrust immunity be implied for activities explicitly authorized by the securities laws and conduct inextricably intertwined with such activities is similarly underinclusive. Only a holding that *all* activities pervasively regulated by the securities laws are impliedly immune from antitrust liability will vindicate Congress's intention to establish a uniform and stable securities market subject to the expert oversight of the SEC and NASD.

The decision below should be reversed.

ARGUMENT

I. THE DECISION BELOW UNDERMINES THE SECURITIES REGULATORY SYSTEM AND THE NASD'S PERVASIVE REGULATION OF THE IPO PROCESS.

The SEC and NASD closely regulate the underwriting activities upon which respondents' antitrust allegations are premised. Both the SEC and NASD have brought their expertise to bear regarding the permissible range of underwriting activities, and have promulgated a detailed set of regulations governing the IPO process. The regulations are periodically modified in response to changing market conditions. Unlike the antitrust laws, the goal of these regulations is not simply to encourage competition, but also to facilitate capital formation and to protect investors and the market system. In order to promote market stability and capital formation, the SEC and NASD sometimes authorize conduct that might be deemed anticompetitive and illegal under the antitrust laws.

For this reason, the two incompatible regulatory regimes cannot be used to police the same market activities.

A. The NASD Regulates The Broker-Dealer Industry In Order To Promote Competition As Well As Market Stability And Capital Formation.

The NASD stands on the frontline of securities regulation and congressional efforts to "creat[e] . . . a national securities market." National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 102, 110 Stat. 3416, 3418. As an SRO, the NASD monitors its members' compliance with the securities laws and with its own rules in order "to remove impediments to and perfect the mechanisms of a national market system for securities." 15 U.S.C. § 78b; *see also id.* § 78o-3(b)(6). The SEC, in turn, closely oversees the NASD's regulatory activities and promulgates regulations applicable to all market participants.

The SEC and NASD are statutorily required to take competition into account during their regulatory decision-making. Indeed, it is a prerequisite to the NASD maintaining registration as a national securities association that the SEC find that its rules "do not impose any burden on competition not necessary or appropriate." 15 U.S.C. § 78o-3(b)(9); *see also, e.g., id.* § 77b(b) ("Whenever . . . the Commission is . . . required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."). As the legislative history to the 1975 Securities Act Amendments explains, however, "[t]his explicit obligation to balance, against other regulatory criteria and considerations, the competitive implications of self-regulatory and Commission action should *not* be viewed as requiring the Commission to justify that such actions be the least anti-competitive manner of achieving a regulatory ob-

jective." S. Rep. No. 94-75, at 13-14 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 191-92 (emphasis added).

The legislative history reflects the fact that competition is not the only consideration relevant to the SEC's and NASD's regulatory policies. Other objectives of the securities laws include the promotion of capital formation and a stable securities market. *See* 15 U.S.C. § 80a-2(c). Establishing a vigorous capital formation process and a stable market sometimes requires conduct that could be deemed anticompetitive under the antitrust laws, which may include, for example, the type of aftermarket price maintenance at issue in this case.

Thus, although competition is an important—and statutorily mandated—consideration in the securities regulatory system, the SEC and NASD are required to balance competitive interests against other considerations, in order to develop the regulatory strategy most likely to foster a "national market system," "promote just and equitable principles of trade," and "protect investors and the public interest." 15 U.S.C. § 78o-3(b)(6). In contrast, the antitrust laws are primarily focused on competition (*State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997)), and therefore cannot be reconciled with the broader objectives of the securities regulatory regime, which balances competitive considerations against other equally important values.

Indeed, this Court itself has already recognized that inconsistent standards of conduct "are likely to result [from application of the antitrust laws to securities transactions] because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry." *Gordon*, 422 U.S. at 689.

B. The NASD Closely Regulates Its Members' Participation In The IPO Process.

Against this regulatory backdrop, the NASD is responsible for overseeing its members' participation in the IPO proc-

ess and disciplining members who engage in prohibited market activities. *See, e.g.*, NASD Rule 2790: Restrictions on the Purchase and Sale of Initial Equity Public Offerings. The NASD's regulation of broker-dealers requires it to enforce nuanced distinctions between permissible joint activities and improper collusive arrangements, and between lawful efforts to stabilize a security's price and impermissible instances of price manipulation.

Although coordination among underwriting syndicates is generally a permissible means of effecting an IPO distribution, *see* SEC Release No. 34-17,371, 45 Fed. Reg. 83,707 (Dec. 19, 1980), the NASD has developed extensive rules concerning syndicates' operations. *See, e.g.*, NASD Rule 2710: Corporate Financing Rule—Underwriting Terms and Arrangements (requiring underwriting compensation to be fair and reasonable); NASD Rule 2770: Disclosure of Price in Selling Agreements (requiring the disclosure of the public selling price in syndicate agreements). The NASD has also issued rules that establish the boundary lines between permissible and impermissible price control during the IPO process. *See, e.g.*, NASD Manual, IM-2110-5: Anti-Intimidation/Coordination ("It is conduct inconsistent with just and equitable practices of trade" for an underwriter "to coordinate [its] prices . . . with any other [NASD] member," except "to the extent permitted by the federal securities laws"). These NASD rules must be designed to "protect investors," 15 U.S.C. § 78o-3(b)(6), and have been explicitly approved by the SEC.

These NASD regulations are reinforced by additional guidance from the SEC, which has promulgated its own regulations distinguishing acceptable and unacceptable means of maintaining a security's price. Although the securities regulatory system generally looks with disfavor on price manipulation, 15 U.S.C. § 78i(a), the SEC has not instituted a blanket prohibition on all such activities. For example, SEC Regulation M does not allow quid pro quo arrangements or

aftermarket price stabilization, *except* to prevent or slow a decline in price. Pet. App. 103a-04a; 17 C.F.R. §§ 242.101, 242.104. The flexibility to undertake such stabilization activities, in the SEC's expert judgment, is necessary to the success of the capital formation process. *See* Anti-Manipulation Rules Concerning Securities Offerings, 62 Fed. Reg. 520, 521 (Jan. 3, 1997). Moreover, an underwriter may gather information from a potential investor regarding its "desired long-term future position in the security" and the prices at which the investor would hold or sell its shares in the immediate aftermarket, Pet. App. 224a, but may not "inquire[] whether the customer intends to place orders in the immediate aftermarket, and if so, at what prices and quantities." Pet. App. 227a-28a. The SEC has also delineated the factors a firm may consider when determining how to allocate IPO shares, making clear that the securities laws do not "prohibit a firm from allocating IPO shares to a customer because the customer has separately retained the firm for other services," so long as the customer has "not paid excessive compensation." SEC Release No. 33-8511, 69 Fed. Reg. 75,774, 75,785 (Dec. 17, 2004).

The SEC and NASD rules governing the IPO process enable underwriters to manage the risk inherent in that process, as well as to stabilize prices and prevent market fluctuations that impede the accumulation of capital and harm investors. This regulatory regime affords market participants the flexibility to develop innovative responses to swiftly changing market conditions. Without the benefit of such flexibility, the IPO process would be inefficient, unstable, and uncertain because underwriters would lack the tools to gather information necessary to make an initial offering to investors and to ensure the success of the offering once it has been made.[3]

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[3] Such instability and uncertainty may compel both American and multinational companies to go public in foreign countries that provide a more stable and efficient regulatory framework for the IPO process. Although it

Superimposing antitrust law—with its single-minded focus on competition—on the existing securities regulatory framework would profoundly disrupt the congressional plan, and the efforts of the SEC and NASD under that plan to strike the appropriate balance among competition, capital formation, and market stability. Unlike the rigid antitrust laws, the comparatively flexible securities laws tolerate some degree of anticompetitive conduct when necessary to promote the national market system or protect the interests of investors. In order to vindicate Congress's intentions when enacting the securities laws and designing the carefully calibrated system for regulating the securities markets, the propriety of petitioners' conduct must therefore be evaluated by the SEC and NASD under the lens of the securities regulatory regime, rather than by juries struggling to reconcile the conflicting mandates of the antitrust and securities laws.

II. THE ANTITRUST LAWS ARE REPEALED AS TO ALL ACTIVITIES PERVASIVELY REGULATED BY THE SECURITIES LAWS.

Under this Court's antitrust immunity jurisprudence, the antitrust laws are repealed as to all activities subject to the comprehensive regulation of the securities laws. Because the Second Circuit's decision overlooked the relevance of the extensive securities regulatory regime and instead inquired into the existence of a direct conflict between the securities and antitrust laws, it flatly contradicts this Court's precedent.

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is a complex question, driven by many variables, the Nation's IPO markets face vigorous competition from foreign markets. *See, e.g.*, *Battle of the Bourses—Financial Exchanges*, Economist, May 27, 2006, at 65 ("In 2000 nine out of every ten dollars in the world's initial public offerings were raised in America. [In 2005] nine out of every ten dollars were raised outside America . . . .").

A. This Court's Decisions In *Gordon* And *NASD* Establish That The Antitrust Laws Cannot Be Applied To Conduct Subject To Comprehensive Regulation By The Securities Laws.

This Court has held that the antitrust laws are impliedly repealed whenever an activity is subject to pervasive regulation under another statutory framework, or where there is a potential conflict between the antitrust laws and another legal regime.

In *Gordon*, this Court held that the New York Stock Exchange ("NYSE") possessed implied antitrust immunity from a Sherman Act suit challenging its fixed-rate commission structure. 422 U.S. at 691. The Court's analysis emphasized that the SEC exercised regulatory authority over the NYSE's commission rates and had approved its fixed-rate structure. *Id.* at 682. There was accordingly a "plain repugnancy" between the antitrust laws, which treated price fixing as a *per se* violation, and the securities regulatory regime, which tolerated some instances of price fixing. *Id.* Implied antitrust immunity was necessary, the Court explained, because allowing the antitrust suit to proceed would have subjected the NYSE to conflicting standards of conduct and "unduly interfere[d] . . . with the operation of the Securities Exchange Act." *Id.* at 686.

In *NASD*, decided the same day as *Gordon*, this Court held that an antitrust suit could not be brought challenging agreements fixing the price of mutual funds. 422 U.S. at 694. The allegations in *NASD* are very similar to those at issue in this case: The plaintiffs alleged certain horizontal combinations among the members of the NASD as well as a variety of vertical arrangements that affected the price of mutual fund shares. *Id.* at 702. For example, the plaintiffs alleged that mutual fund underwriters and broker-dealers had entered into agreements requiring the broker-dealers to maintain the pre-

determined public offering price when selling mutual fund shares, thereby artificially inflating the price. *Id.* at 702 n.11. The Court held that the SEC had the power to authorize such price restraints under the Investment Company Act, 15 U.S.C. § 80a-22(f), and that—although the SEC had *not* exercised that authority—antitrust immunity was required because there was "no way to reconcile the Commission's power to authorize these restrictions with the competing mandate of the antitrust laws." *NASD*, 422 U.S. at 722. Because the SEC had the authority to authorize conduct proscribed by the antitrust laws, these laws had to "give way" to ensure the viability of the mutual fund regulatory scheme established by the Investment Company Act. *Id.* at 729.

Turning to the allegations involving horizontal agreements between the NASD and its members, the Court began by acknowledging that the activities in question were "neither required . . . nor authorized" under the Investment Company Act. *NASD*, 422 U.S. at 730. The Court thus inquired "whether the SEC's exercise of regulatory authority . . . is sufficiently pervasive to confer an implied immunity." *Id.* The Court recognized that the "SEC, in its exercise of authority over association rules and practices, is charged with protection of the public interest as well as the interests of shareholders, and it repeatedly has indicated that it weighs competitive concerns in the exercise of its continued supervisory responsibility." *Id.* at 732-33 (citations omitted). The Court concluded that "implied repeal of the antitrust laws" was therefore "necessary to make the [regulatory scheme] work" because the "maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger . . . [of] duplicative and inconsistent standards." *Id.* at 734, 735 (first alteration in original; internal quotation marks omitted).

Recently, the relevance of a detailed regulatory regime to antitrust immunity analysis was reaffirmed in *Trinko*. 540 U.S. 398. Although *Trinko* was not an antitrust immunity

case, the Court explicitly drew upon antitrust immunity principles to conclude that a plaintiff failed to state a claim under the Sherman Act in a suit alleging that an incumbent local exchange carrier had violated its obligations under the Telecommunications Act of 1996. *See id.* at 412 ("Just as regulatory context may in other cases serve as a basis for implied immunity, it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2" of the Sherman Act) (citing *NASD*, 422 U.S. at 730-35). The Court explained that, where there is a regulatory structure in place to deter and remedy anticompetitive harm, "the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny." *Id.* Because the Federal Communications Commission ("FCC") took antitrust considerations into account in its regulatory decision-making, it was an "effective steward of the antitrust function," and a suit under the Sherman Act was therefore unavailable. *Id.* at 413.

Respondents' antitrust claims must be dismissed under *Gordon*, *NASD*, and *Trinko*. Antitrust law, the primary goal of which is to foster competition, cannot be used to regulate activities also subject to the federal securities laws, which, in order to further the goals of market stability and capital formation, authorize conduct that might be deemed anticompetitive under antitrust principles. As in *Gordon*, which found that antitrust immunity was appropriate because the Exchange Act left the fixing of rates of commission to the SEC, 422 U.S. at 691, here, SEC and NASD regulations permit certain types of coordinated activity among underwriters and investors that might be proscribed by the antitrust laws, and thus "failure to imply repeal [of those laws] would render nugatory" these aspects of the securities regulatory regime. *Id.*

Moreover, even in the absence of these regulations, *NASD* and *Trinko* make clear that antitrust immunity is necessary to effectuate the SEC's and NASD's comprehensive

regulation of the IPO process. *NASD*, 422 U.S. at 734; *see also Trinko*, 540 U.S. at 406. Just as the NASD is subject to the "extensive" "supervisory authority" of the SEC, *NASD*, 422 U.S. at 732, the market activities of the underwriters and institutional investors sued in this antitrust suit are subject to pervasive regulation by the SEC and NASD. Congress intended the securities experts of the SEC and SROs—not individual cases—to determine the propriety of alleged anticompetitive behavior in this regulatory setting. *Cf. Brown v. Pro Football, Inc.*, 518 U.S. 231, 240-41, 242 (1996) (holding that labor law's implicit antitrust exemption barred an antitrust suit because allowing the suit to proceed would have "require[d] antitrust courts to answer a host of important practical questions about how collective bargaining . . . is to proceed," which is a matter best addressed by the experts at the National Labor Relations Board, rather than "nonexpert antitrust judges and juries").

Implied immunity does not mean, however, that competitive considerations will be disregarded or undervalued in the securities markets. Just as the FCC was an "effective steward" of the antitrust function in *Trinko*, 540 U.S. at 413, the SEC and NASD are required to take competitive considerations into account when regulating the securities markets. Application of the antitrust laws in the securities setting is therefore unnecessary and inappropriate because the SEC and NASD promulgate rules and develop policies that promote competition in the securities markets—to the extent that competition is consistent with the other objectives on which the securities regulatory system is premised.

B. The Second Circuit's Approach To Implied Immunity Is Significantly Underinclusive.

The Second Circuit's decision disregards *NASD*'s teachings regarding the significance of pervasive regulation to implied immunity analysis, and, if affirmed, would profoundly disrupt the regulatory efforts of the SEC and NASD.

The Second Circuit applied an entirely novel test for implied antitrust immunity that places undue emphasis on the search for a *specific* conflict between the securities and antitrust laws. The court examined *Gordon* and identified four factors that this Court had purportedly considered as part of its antitrust immunity inquiry. Pet. App. 57a. Applying the factors that it had distilled from *Gordon* to respondents' complaint, the court first explained that the legislative history contained no specific discussion of the immunization of the types of coordinated activity and price maintenance alleged in this case. Pet. App. 64a. The court also pointed to the absence of an argument by petitioners that "the [SEC] could *compel* the anticompetitive conduct." Pet. App. 65a (emphasis added). The court further noted that it could not identify a single point of specific conflict between the antitrust laws and a "particularized grant of power to the [SEC]" to regulate IPO activities. Pet. App. 65a-66a. Finally, the court explained that there had never been any SEC authorization of the conduct alleged in this suit. Pet. App. 66a. On this basis, it concluded that this Court's precedents do not support immunity in this case. Pet. App. 67a.

The Second Circuit's antitrust immunity analysis cannot be reconciled with *Gordon* or *NASD*, and excludes significant amounts of conduct that should be shielded from antitrust liability. *Gordon* makes clear that a court must take into account the disruptive effect that an antitrust suit would have upon the SEC's and NASD's regulatory regimes and upon firms' capital formation efforts. 422 U.S. at 686. By narrowing the field of inquiry to the question whether the anticompetitive behavior was *specifically* addressed in the legislative history, in the statutory text, or by the past enforcement activities of the SEC, the Second Circuit has condoned respondents' "undu[e] interfere[nce] . . . with the operation of the Securities Exchange Act" through the imposition of an antitrust overlay on the already comprehensive securities regulatory regime. *Id.*

Indeed, the Second Circuit's decision wholly disregards *NASD*'s discussion of the significance of pervasive regulation to antitrust immunity analysis. *See Trinko*, 540 U.S. at 406 (citing *NASD*, 422 U.S. at 694). By allowing the antitrust laws to be used to regulate conduct already subject to the extensive securities law framework, the Second Circuit's decision creates the possibility that participants in the securities markets will be subjected to "duplicative and inconsistent standards," *NASD*, 422 U.S. at 735, under the antitrust and securities laws.[4]

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[4] The Second Circuit's decision itself provides an example of the inconsistent standards that will inevitably result from authorizing antitrust suits concerning activities regulated by the SEC and NASD. The Second Circuit asserted that the "[SEC] has consistently limited the definition of 'stabilization' to stabilizing activities that maintain securities prices or retard their decline, not manipulations that raise prices." Pet. App. 66a. This statement is incorrect. First, activities designed to retard the decline of prices are inherently activities that raise prices. Second, the SEC has expressly authorized underwriters to enter into agreements with an issuer to provide for an "overallotment option." Such an option, known as a "Green Shoe" option, allows underwriters "the right, but not the obligation, to purchase securities from the issuer in addition to those initially underwritten by the syndicate, which may constitute up to 15% of the initial underwritten amount." Trading Practices Rules Concerning Securities Offerings, 61 Fed. Reg. 17,108, 17,124 n.86 (Apr. 18, 1996). An underwriter may need to exercise such an option because it has chosen to "oversell" the offering and must then purchase additional shares to cover that short position. The SEC has explicitly authorized the underwriter to purchase up to 15% more shares from the original issuer, rather than on the open market. Accordingly, such 15% allocations are always lawful when they occur.

The SEC has explained that these types of "syndicate covering transactions can . . . enable underwriters to support the aftermarket price of the offered security at levels that they may not obtain in the absence of their activity, thereby interfering with free market forces." SEC Release No. 33-8511, 69 Fed. Reg. 75,774, 75,781 (Dec. 17, 2004). When considering amendments to Regulation M, the SEC did not forbid such practices, although it acknowledged that the covering of syndicate short positions

NASD demonstrates that antitrust immunity cannot be limited to those activities that are premised on specific regulatory authorizations. Under the Second Circuit's reading of this Court's precedent, however, antitrust law would become a sword of Damocles hanging over the securities industry. Any market activities that are consistent with the securities laws but have not yet been specifically authorized by the SEC or NASD could potentially be challenged under the antitrust laws. Conduct that could promote market stability and capital formation would inevitably be chilled by the alarming prospect of treble damages assessments under the antitrust laws.

The Second Circuit's approach to antitrust immunity is also inconsistent with the system of cooperative self-regulation that governs the securities markets. The NASD and other SROs operate under broad grants of authority from Congress. SRO functions thus frequently cannot be linked to a specific statutory provision. These grants of open-ended authority from Congress afford SROs the flexibility necessary to propose new rules, based on their front-line regulatory experiences, that respond to evolving industry practices and that promote the effective functioning of the capital markets. *See, e.g.*, 15 U.S.C. § 78o-3(b)(2) (broadly delegating to the NASD the power, *inter alia*, to "enforce compliance by its members and persons associated with its members, with the provisions of this chapter"). The Second Circuit's requirement that specific statutory language conflict with the antitrust laws in order to trigger immunity will undermine SROs' ability to respond to changing market conditions in a timely and innovative fashion. Just as threatening underwriters and broker-dealers with antitrust liability would severely impair

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through this mechanism "can allow the syndicate to price the offering more aggressively . . . and support the aftermarket at prices around or above the offering price." *Id.* at 75,780.

the strength and stability of the capital markets, the Second Circuit's novel approach to antitrust immunity would impede the NASD's ability to perform more generally the important responsibilities it possesses within the congressional scheme, and those delegated to it by the SEC.

C. The Test For Implied Immunity Advocated By The United States Is Similarly Underinclusive.

The test articulated by the United States is also legally flawed. By focusing on authorized activities, and activities "inextricably intertwined" with expressly permitted conduct, the United States would narrow the implied immunity recognized in this Court's decisions and provide inadequate scope to the securities industry.

Although the test suggested by the United States is broader than that advanced by the Second Circuit, it still places undue emphasis on whether particular actions are explicitly authorized by the securities laws. It thus limits the range of market activities in which investors are likely to engage to those authorized in unambiguous terms by the securities laws and compels market participants to forgo other—legal—activities for fear that a court might find that an action was not authorized by those laws. The standard advocated by the United States therefore conflicts with Congress's intention to use broad grants of regulatory authority to foster innovative efforts by market participants and regulators to develop capital and promote competition. Parsing the securities laws into isolated and unrelated grants of authority would severely undermine the capital formation process by limiting the flexibility needed to respond to rapidly changing market conditions, and would substantially compromise the SEC's and NASD's regulation of the securities markets.

Moreover, the test proposed by the United States is likely to breed extensive litigation regarding its applicability in specific factual situations and to encourage artful pleading by

antitrust plaintiffs. Because the standard requires that a complaint allege antitrust violations premised on activities that are neither authorized by the securities laws nor intertwined with authorized activities, determining whether a defendant is entitled to immunity will require a lengthy, fact-intensive comparison of the conduct alleged in the complaint and the scope of activity authorized by the securities laws. Once the parameters of antitrust immunity have become relatively clear, plaintiffs will be able to plead around the immunity hurdle by simply alleging that a defendant engaged in conduct that was not authorized by the securities laws or closely related to authorized activity. In order to neutralize the uncertainties of the litigation process and the possibility of a treble damages assessment, defendants are likely to settle these antitrust suits or forgo altogether economically beneficial market activities not explicitly authorized by the securities laws.

Under the test urged herein, such economically disadvantageous compromises are unnecessary because market participants can be certain that any securities-related activities subject to regulation under the securities laws are immune from antitrust liability. At the same time, competition is safeguarded by the SEC's and NASD's "effective steward[ship] of the antitrust function." *Trinko*, 540 U.S. at 413.

D. A Remedy For Improper Market Activities Must Be Sought Under The Securities Laws Or Through Enforcement Actions By The SEC Or NASD.

The implied repeal of the antitrust laws for market activities pervasively regulated by the SEC and NASD does not leave aggrieved parties without a remedy or the markets without protection. Investors who allege that they have been injured by price manipulation may file a federal securities fraud claim (as another group of plaintiffs did concerning the very conduct at issue here (Pet. App. 2a)). Investors may also

submit a complaint to the NASD, which may, in turn, initiate disciplinary action against one or more of its broker-dealer members. Allowing investors to pursue an antitrust claim against underwriters and institutional investors will needlessly—and dangerously—undermine the SEC's and NASD's enforcement-related decision-making and unsettle the existing, highly detailed regulatory framework. *See Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.) ("where regulatory and antitrust regimes coexist, antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies") (internal quotation marks and citations omitted).

The SEC and NASD have brought their regulatory expertise to bear regarding the alleged price manipulation that is also the subject of this suit. Indeed, the SEC filed civil actions and the NASD initiated disciplinary proceedings against several petitioners for the very conduct at issue in this case. *See, e.g., SEC v. Robertson Stephens, Inc.*, No. 03-00027 (D.D.C. Jan. 10, 2003) (consent judgment against Robertson Stephens, Inc., based upon allegation that it entered into anticompetitive arrangements with technology IPO customers); *SEC v. Credit Suisse First Boston Corp.*, No. 02-00090, 2002 WL 479836 (D.D.C. Jan. 29, 2002) (consent decree enjoining Credit Suisse from engaging in improper IPO-related conduct); NASD, News Release: NASD Fines J.P. Morgan for Sharing in Profits from Hot IPOs (Feb. 20, 2003), *at* http://www.nasd.com/PressRoom/NewsReleases/2003NewsReleases/NASDW_002951; NASD, News Release: NASD Sanctions Investment Banks for IPO Violations (May 18, 2004), *at* http://www.nasd.com/PressRoom/NewsReleases/2004NewsReleases/NASDW_002829. The NASD is also considering several rule amendments to address incidents of price manipulation, *see, e.g.*, NASD Proposed Rule 2712: IPO Allocations and Distributions (SR-NASD-2003-140), and has promulgated NASD Rule 2790:

Restrictions on the Purchase and Sale of Initial Equity Public Offerings, which sets forth a series of restrictions on the terms of IPO offerings. The availability of an antitrust cause of action regarding the highly regulated market activities at issue in this case would significantly compromise these carefully considered enforcement efforts.

CONCLUSION

Capital formation through a robust, stable, and efficient securities market is essential to this Nation's economy. Congress has fostered a tremendously successful securities system by establishing a comprehensive regulatory framework that, under the expert guidance of the SEC and SROs, has promoted capital formation, protected investors, and prevented fraudulent conduct by market participants. In order to effectuate these congressional objectives, this Court recognized in *Gordon* and *NASD* that the antitrust laws are incompatible with the securities regulatory regime because application of their competition-enhancing principles in the securities setting would proscribe large swaths of marginally anticompetive conduct beneficial to the securities markets and disturb the delicate balance between competition, capital formation, and market stability embodied in the securities laws. Respondents' attempt to superimpose the antitrust laws on the securities regulatory framework would fatally impair this carefully calibrated regulatory system and should therefore be unequivocally rejected by this Court.

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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